No. 76-1151

In the Supreme Court of the United States

OCTOBER TERM, 1976

UNITED STATES OF AMERICA, PETITIONER

v.

RALPH CECCOLINI

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is reported at 542 F.2d 136. The oral opinion of the district court (App. D, *infra*) is unreported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*) was entered on September 15, 1976. A petition for rehearing and suggestion for rehearing *en banc* was denied on December 21, 1976 (App. C, *infra*). On January 13, 1977, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to and including February 19, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the exclusionary rule prevents the use of the fruits of an illegal search in a prosecution for perjury committed after the search.

2. Whether the exclusionary rule requires the suppression of the trial testimony of a witness whose identity or whose possession of relevant information was learned as the result of an illegal search.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

After a jury-waived trial in the United States District Court for the Southern District of New York, respondent was found guilty of one count of making a false declaration before a federal grand jury investigating gambling operations, in violation of 18 U.S.C. 1623. The district judge thereupon immediately set aside his finding on the ground that the testimony of government witness Lois Hennessey should be suppressed as the fruit of an unlawful search of an envelope on a counter in respondent's flower shop (App.

D, *infra*, pp. 24a, 34a). On the government's appeal, the court of appeals affirmed (App. A, *infra*, pp. 1a–20a).

1. The evidence showed that in the second half of 1973, F.B.I. agents conducted an investigation of gambling in North Tarrytown, New York, that included a surveillance of respondent's flower shop, a place that was frequently visited by Francis J. Millow, a target of the investigation. Their observations led them to conclude that the flower shop was either a drop spot or pickup spot for policy gambling operations. The surveillance was discontinued in December 1973 (Tr. 302–308, 314–316).

On December 18, 1974, uniformed police officer Ronald Biro, who had been assigned to patrol school crossings on that day, entered respondent's shop on a cigarette break. Biro was acquainted with Lois Hennessey, an employee in respondent's shop, and as he talked with her he observed an envelope on the top of the cash register drawer with money protruding from it. Biro picked up the envelope, looked through its contents, observed that the envelope also contained policy slips, and put the contents back in the envelope. He then placed the envelope back on the cash register (Tr. 66, 99–103, 117, 143, 184–189, 200–202).

Hennessey was reading a newspaper while Biro examined the envelope, and Biro did not inform her of what he had discovered (Tr. 102, 143–144, 202). In response to Biro's inquiry as to whose envelope it was, Hennessey replied that it was respondent's and that respondent had told her to give the envelope to someone. Biro did not ask her who the intended recipient

was. Biro then left respondent's shop. (Tr. 66, 102–103, 187–188, 202–203). At the time he examined the envelope, Biro was unaware that a gambling investigation of the shop had been undertaken and had no reason to suspect that Hennessey was giving envelopes with policy wagers to Millow or anyone else (Tr. 203–204, 206–207, 223).[1]

On the following day, Biro mentioned what he had observed in the flower shop to other local police officers (Tr. 203–204), who in turn informed F.B.I. Agent A. Lance Emory that Biro had seen an envelope containing gambling records in the flower shop. Emory assumed that the information that was relayed to him had been legally obtained (Tr. 360–362, 368, 482).

Approximately four months later, in March or April 1975, Emory conferred with Lois Hennessey at her home for about 15–20 minutes, in the presence of her mother and two sisters. After identifying himself, Emory told Hennessey that he had learned through the police department that she was employed by respondent and that the "Government was interested in any information she might provide regarding incidents in [respondent's shop]" (Tr. 108–112, 124–125, 153–154, 363–365, 369, 372, 390–391, 397–398). Hennessey, who was then studying police science in college and was interested in police work, said that "she would be willing to help the Government" (Tr. 390). Although Emory did not specifically refer to the Biro incident during the course of their meeting, and Hennessey

[1] Respondent was not present at the time Biro was in the shop, and it was not until shortly before trial that he became aware of Biro's search (App. A, *infra*, p. 4a).

testified that the incident "wasn't on my mind" at the time, she related the events of that day to Emory (Tr. 109, 111–112, 125–126, 365–367, 371, 389). Thereafter, Emory informed an attorney for the Department of Justice about Hennessey (Tr. 392, 402–403).

In May 1975, both Hennessey and respondent were subpoenaed to testify and did testify before the grand jury. In his testimony on May 12, respondent unequivocally denied that he ever took policy bets at his shop for Millow (Govt. Ex. 2).[2]

Respondent's grand jury testimony was shown to be false at trial by the testimony of Hennessey. She testified that she had observed customers place policy and football bets with respondent and that those bets were then given by respondent to Millow, who would come into respondent's shop almost daily (Tr. 67–74, 80–85, 89, 113–114, 117, 141–142). A tape recording of an intercepted telephone conversation between respondent and Millow also implicated respondent in gambling activity (Tr. 339–341), as did the evidence of the physical surveillance of respondent's shop (Tr. 302–308, 315–316).

2. At the conclusion of the trial, the district court found respondent guilty of perjury.[3] After making this

[2] A witness at respondent's trial testified (Tr. 166–167) that she was present during a conversation between respondent and Millow on May 9, three days prior to respondent's grand jury appearance, at which Millow told respondent "[y]ou are going downtown Monday to see the big boys * * * and whatever they ask you, just tell them you don't remember, because if you don't remember, that is not lying" (Tr. 168).

[3] Respondent was acquitted on a second count of perjury,

finding however, the court granted respondent's motion to suppress Hennessey's testimony,[4] on the basis of the court's determination that her testimony at trial was tainted by the fact that her potential as a witness "first came directly to the attention of the government as a result of an illegal search" and that the government "has not sustained its burden of showing that Lois Hennessey's testimony definitely would have been obtained without the illegal search" (App. D, *infra*, pp. 26a–27a). The court concluded that, without her testimony, there was insufficient evidence of respondent's guilt (App. D, *infra*, p. 30a).

3. On the government's appeal, a divided court of appeals affirmed (App. A, *infra*).[4a] The court rejected the government's contention that the testimony of Lois Hennessey "was an act of free will sufficient to purge the taint of any unlawful invasion * * * on December 18, 1974" (App. A, *infra*, p. 12a). Noting that the F.B.I. agent had sought out Hennessey, it concluded that the district court's suppression of Hennessey's testimony was proper because "the road to Miss Hennessey's testimony from Officer Biro's concededly unconstitutional search is both straight and uninterrupted" (App. A, *infra*, p. 13a). The court also rejected the government's argument that the exclusionary rule should not be applied when the evidence derived from the search is being used to prove an independent crime, here perjury, that occurred long after the unlawful intrusion (*id.* at 13a–15a).

Judge Van Graafeiland, dissenting, urged that the doctrine of attenuation of taint should have different application when the evidence under consideration is the testimony of a live witness. Since Hennessey was not coerced by the government into becoming a witness, and her testimony was clearly established as being the product of her " 'willingness to cooperate with the FBI' " (App. A, *infra*, p. 18a), Judge Van Graafeiland concluded that the testimony should be admissible because the factor of the witness's willingness to cooperate sufficiently purged the taint of the prior search (*id.* at 17a–18a). Aligning himself with decisions of the United States Court of Appeals for the District of Columbia Circuit, he noted that there "is a marked difference * * * between our holdings and those of [that court] which should, perhaps, be resolved by the Supreme Court" (*id.* at 17a, n. 3). In his view, the majority's decision could only be "attributed to its disenchantment with the attenuation rule itself, not the application of the rule to the facts of this case" (*id.* at 19a–20a).

REASONS FOR GRANTING THE WRIT

This case presents two important questions concerning the application of the exclusionary rule: first, whether the rule requires the exclusion of the fruits of

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which charged that he had made false statements in the grand jury when testifying that he did not know that one Hank Bucci was involved in gambling operations.

[4] Before the evidence was presented, respondent had made a motion to exclude the testimony of Lois Hennessey on the ground that her identity was procured as a result of an illegal search. The court reserved decision on the motion until the trial was completed (Tr. 17–19).

[4a] The court first held (App. A, *infra*, p. 7a) that the government could appeal the ruling of the district court. This conclusion was plainly correct. See *United States* v. *Jenkins*, 420 U.S. 358, 365.

an illegal search when they are introduced to prove a crime that was neither committed nor foreseeable at the time of the search; and second, whether the rule requires the exclusion of the testimony of a live witness whose identity or whose possession of relevant information was learned as a result of an illegal search. Both issues have generated conflicting courts of appeals decisions, and review by this Court is appropriate both because of the inherent significance of the issues and in order to resolve the conflict among the circuits.

1. The suppression of the fruits of an unlawful search in a prosecution for an independent offense committed long after the search is contrary to the policies underlying the exclusionary rule, which "has never been interpreted to proscribe the use of illegally seized evidence in all procedings, or against all persons" and which, in view of its substantial societal costs, is to be carefully "restricted to those areas where its remedial objectives are thought most efficaciously served." *United States* v. *Calandra*, 414 U.S. 338, 348. See also *Stone* v. *Powell*, No. 74–1055, decided July 6, 1976, slip op. 19.

The primary objective, if not the sole objective, of the exclusionary rule "is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures." *United States* v. *Calandra*, *supra*, 414 U.S. at 347. Accord, *e.g.*, *United States* v. *Janis*, No. 74–958, decided July 6, 1976, slip op. 13; *Stone* v. *Powell*, *supra*, slip op. 18–19; *United States* v. *Peltier*, 422 U.S. 531, 536–539; *Michigan* v. *Tucker*, 417 U.S.

433, 446–447; *Desist* v. *United States*, 394 U.S. 244, 254 n. 24; *Linkletter* v. *Walker*, 381 U.S. 618, 636–637. Accordingly, this Court has declined to apply the exclusionary rule in circumstances where exclusion would have a minimal deterrent effect on police misconduct and where exclusion would frustrate significant public interests.

Thus, in *Calandra*, the Court declined to apply the exclusionary rule to prohibit the government from asking a grand jury witness questions based on information obtained in an illegal search. The Court observed that such an "extension of the exclusionary rule would seriously impede the grand jury" and stated that "[a]ny incremental deterrent effect which might be achieved by extending the rule to grand jury proceedings is uncertain at best." 414 U.S. at 349, 351. In *Janis*, the Court declined to apply the exclusionary rule to bar evidence illegally seized by a state officer from admission in a federal civil tax proceeding, reasoning that "the additional marginal deterrence provided by forbidding a different sovereign from using the evidence in a civil proceeding surely does not outweigh the cost to society of extending the rule to that situation" (slip op. 20). In *Michigan* v. *Tucker*, the Court held that the *Miranda* exclusionary principle did not apply to bar the testimony of a witness who was identified by the defendant in the course of questioning that followed inadequate warnings, in part on the ground that the "deterrent effect on future police conduct [of] the exclusion of [the defendant's] statements * * * would [not] be significantly augmented by exclud-

ing the testimony of the witness * * * as well" (417 U.S. at 448).[5]

The principle underlying the foregoing decisions applies with particular force to prosecutions for crimes committed after the unlawful police conduct has occurred, especially when, as in this case, the subsequent crime is independent of the purpose of the police investigation that embodied the unlawful search. It is difficult to imagine how police misconduct could be significantly deterred by the prospect of the exclusion of the fruits of a search in the prosecution of a crime that has not taken place and the commission of which is not foreseeable at the time of the search. However zealous they may be, law enforcement officials surely have little incentive to conduct illegal searches for evidence of crimes that have not yet taken place, particularly since their actions may jeopardize the prosecution of a crime that has taken place. Indeed, the potential for deterrence is even less than in cases such as *Calandra*, *Janis*, and *Michigan* v. *Tucker*, in which the Court has declined to apply the exclusionary rule.

There are especially compelling reasons, moreover, for declining to apply the exclusionary rule when the subsequently committed crime is perjury. This Court has held that the compelling public interest in securing

[5] The absence of significant deterrence benefits has also been the basis of decisions declining to apply exclusionary rules retroactively (see *United States* v. *Peltier*, 422 U.S. 531; *Desist* v. *United States*, 394 U.S. 244, 254, n. 24; *Linkletter* v. *Walker*, 381 U.S. 618, 636–637) and of decisions denying standing to persons who were not themselves the victim of unconstitutional searches. *Alderman* v. *United States*, 394 U.S. 165, 174–175; *Brown* v. *United States*, 411 U.S. 223.

truthful testimony—an objective that is essential to the very functioning of the judicial process—cannot permit the exclusionary rule to be used as a shield against legitimate grand jury investigations or as a license for perjury. *United States* v. *Calandra*, *supra*; *United States* v. *Mandujano*, 425 U.S. 564. See also *Oregon* v. *Hass*, 420 U.S. 714; *Harris* v. *New York*, 401 U.S. 222, and *Walder* v. *United States*, 347 U.S. 62, where the Court declined to apply the exclusionary rule to prohibit the government from impeaching false testimony by means of unlawfully obtained evidence.

The policies underlying those decisions should control the instant case. In *Mandujano*, the Court held that a defendant could be prosecuted for perjury even if his allegedly false grand jury testimony was procured without giving constitutionally required warnings. In *Hass*, *Harris*, and *Walder*, as here, the government sought to use unlawfully obtained evidence against perjury committed after the evidence was obtained. The fact that here, unlike those cases, the evidence is sought to be used directly in a prosecution for perjury rather than for the impeachment of false testimony given during the trial of some other charge is immaterial. In both situations the evidence is used against subsequent perjury, and its use is necessary to protect the judicial process from false testimony; moreover, the evidence may be as damaging to the defendant when used for impeachment as when used directly to prosecute for perjury.

The decision below is in direct conflict with decisions of the Fifth and the Ninth Circuits, which have held that the exclusionary rule does not prevent the use of

the fruits of an illegal search in a prosecution for perjury committed after the search. *United States* v. *Turk*, 526 F. 2d 654 (C.A. 5), certiorari denied, October 4, 1976, No. 75–1633; *United States* v. *Raftery*, 534 F. 2d 854 (C.A. 9), certiorari denied, October 4, 1976, No. 76–5007. The courts in those cases analyzed the policies of the exclusionary rule, as reflected in the decisions of this Court discussed above, and concluded that the marginal deterrent effect of suppressing the evidence did not outweigh the substantial interest in preventing perjured testimony.

In contrast, the conclusion of the court below that the exclusionary rule applies to the prosecution of subsequently committed crimes of any kind, including perjury, cited no authority and was made without analysis of the relevant policies underlying the exclusionary rule (App. A, *infra*, pp. 13a–15a). The court attempted to distinguish *Turk* and *Raftery* on the ground that the defendants in those cases were aware of the illegal searches when they gave their false testimony (App. A, *infra*, p. 14a), but such a distinction is untenable. The courts in *Turk* and *Raftery* relied primarily on the absence of significant deterrence benefits to be derived from applying the exclusionary rule to these circumstances and on the compelling public interest in truthful testimony. Those considerations are not affected by the witness's awareness or ignorance of the illegal search. In either case, the exclusionary rule should not apply.

2. The decision below also squarely presents the issue of whether and under what circumstances the "voluntary testimony of a witness at trial * * * is subject to

suppression as the fruit of an illegal search." [6] That is an important question that has been reserved by this Court (*United States* v. *Brignoni-Ponce*, 422 U.S. 873, 876, n. 2; *Harrison* v. *United States*, 392 U.S. 219, 223, n. 9) and upon which there is "marked difference" of opinion in the courts of appeals (App. A, *infra*, p. 17a, n. 3) which this Court should resolve.

The court of appeals concluded that because Hennessey's knowledge of the matters under investigation was discovered as a result of an illegal search, her trial testimony should be suppressed: "the road to Miss Hennessey's testimony from Officer Biro's concededly unconstitutional search is both straight and uninterrupted, and we would not hold her testimony admissible merely because her cooperation with the Government was not coerced" (App. A, *infra*, p. 13a). The court declined to consider the lapse of time between the search and Hennessey's testimony, the likelihood that Hennessey's utility as a witness would have been discovered quite apart from the improper search,[7] and the other evidence at trial which, as Judge Van Graafeiland observed (App. A, *infra*, pp. 18a–19a), clearly established that Hennessey's cooperation with the gov-

[6] *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 876, n. 2.

[7] The government contended on appeal, in addition to the issues raised in this petition, that Hennessey's testimony should have been admissible because the investigation would inevitably have disclosed her utility. The court of appeals rejected the factual premise for this contention (see App. A, *infra*, pp. 8a–11a). While we do not here seek review of the court's conclusion that the discovery of Hennessey was not inevitable, the court's decision, we believe that the likelihood that a live witness would become available apart from any illegal search is relevant to a proper analysis of the issue we do present.

ernment and her testimony were the product of her own free will. In sum, the court of appeals' analysis draws no distinction for purposes of the application of the exclusionary rule between the testimony of live witnesses and any other evidence that might be said to be the fruit of an illegal search.[8]

In our view there are significant differences between live witnesses and other types of evidentiary "fruits" of police misconduct, differences that relate to the fundamental policies of the exclusionary rule and that are implicit in the attenuation doctrine of the exclusionary rule, set forth in such cases as *Brown* v. *Illinois*, 422 U.S. 590; *Wong Sun* v. *United States*, 371 U.S. 471, 488; and *Nardone* v. *United States*, 308 U.S. 338, 341.

The difference between live witness testimony and other types of evidentiary fruits has been recognized and applied by the District of Columbia Circuit in several cases, the most recent of which is *United States* v. *Scios*, No. 75–1619, decided August 23, 1976 petition for rehearing pending (reproduced at App. E, *infra*), where the court held that the testimony of a witness was admissible after applying an analysis substantially different from that of the instant case. In

[8] That approach is reflected in other Second Circuit decisions. See, *e.g*, *United States* v. *Tane*, 329 F. 2d 848, 853 (C.A. 2), where the court suppressed the testimony of a witness whose identity was revealed by an illegal wiretap, because the "road from the tap to the testimony may be long, but it is straight." See also *United States* v. *Karathanos*, 531 F. 2d 26, 34–35 (C.A. 2), certiorari denied, No. 75–1402, July 6, 1976; but cf. *United States* v. *Mullens*, 536 F. 2d 997 (C.A. 2), where the court refused to suppress the confession of a defendant who presented himself to police officers and gave incriminating statements following an unlawful search of his home.

Scios agents illegally searched a file folder in the defendant's office and discovered the name of an individual who was subsequently contacted for questioning. After consulting with an attorney, the individual refused to testify before a grand jury unless immunized, was given immunity, and then testified as a grand jury witness against the defendant. The court of appeals, after applying the principles set forth in *Brown* v. *Illinois*, *supra*, ruled that the prospective trial testimony of the witness was admissible, concluding that the lapse of time and other intervening events sufficiently dissipated the taint of the illegal search as to make the witness's testimony the product of his free will (App. E, *infra*, pp. 48a–56a). The court also concluded that the inspection of the file folder was not sufficiently flagrant to warrant suppression of the witness's testimony and that the "the deterrent purpose of exclusion would be minimally advanced in this case" by barring the witness from testifying (*id.* at 57a).[9]

Other circuits have applied a similar approach and have considered a variety of factors in determining whether live-witness testimony should be suppressed. For example in *United States* v. *Marder*, 474 F. 2d 1192, 1196 (C.A. 5), the court said:

[9] The approach in *Scios* follows other decisions of the District of Columbia Circuit, which have generally held the testimony of live witnesses admissible. See *Brown* v. *United States*, 375 F. 2d 310, 313–315 (C.A.D.C.), certiorari denied, 388 U.S. 915 (testimony admitted); *Smith* v. *United States*, 344 F. 2d 545 (C.A.D.C.) (testimony not admitted); *Edwards* v. *United States*, 330 F. 2d 849 (C.A.D.C.) (testimony admitted); *Smith* v. *United States*, 324 F. 2d 879, 881–882 (C.A.D.C.), certiorari denied, 377 U.S. 954 (testimony admitted). Cf. *McLindon* v. *United States*, 329 F. 2d 238 (C.A.D.C.).

> Proof that the witness would have come forward by his own volition, regardless of his identification by the illegal search, would be extremely relevant to a determination of attenuation. *United States* v. *Hoffman*, 385 F.2d 501, 504 (7th Cir. 1967) [certiorari denied, 390 U.S. 1031]. Likewise, evidence that the witness was completely uncooperative when originally discovered by the illegal search but later changed his attitude and supplied the necessary information, would tend to prove the attenuation of the original taint. See *Smith & Bowden* v. *United States*, 324 F.2d 879, 882, 117 U.S.App.D.C. 1 (1963) [certiorari denied, 377 U.S. 954]. This is certainly not an exhaustive list of the factors to be considered. Only reasoned judgment will determine whether the necessary circumstances exist which call for the application of the attenuation rule to so called "live testimony." [10]

There are, as the cases indicate, a variety of possible approaches to the question of live witness testimony. At one extreme, reflected in the opinion below, live witness testimony is treated no differently from other evidentiary fruits and is suppressed whenever the identity and usefulness of the witness came to the attention of law enforcement officials as a result of an unlawful

[10] In *Marder*, the court held that the testimony should not have been admitted but that its admission was harmless. Other courts applying the balancing test have generally held the testimony admissible. See *United States* v. *Crouch*, 528 F. 2d

search. Such an approach, we submit, is contrary to the principles of *Brown* v. *Illinois* and *Wong Sun*, *supra*, in which the Court recognized that testimonial evidence may—depending on such factors as the time interval between the misconduct and the receipt of the evidence, intervening circumstances, and the purposes and flagrancy of the misconduct—be "sufficiently a product of free will to break, for Fourth Amendment purposes, the causal connection between the illegality and the [testimonial evidence]." *Brown* v. *Illinois*, *supra*, 422 U.S. at 603.[11]

625, 630 (C.A. 7), certiorari denied, No. 75–6985, October 18, 1976 (testimony admitted); *Parker* v. *Estelle*, 498 F. 2d 625, 629–630 (C.A. 5), certiorari denied, 421 U.S. 963 (testimony admitted); *United States* v. *Hoffman*, 385 F. 2d 501, 504–505 (C.A. 7), certiorari denied, 390 U.S. 1031 (testimony admitted); *United States* v. *Evans*, 454 F. 2d 813, 817–818 (C.A. 8), certiorari denied, 406 U.S. 969 (testimony admitted); *United States* v. *Beasley*, 485 F. 2d 60, 63–64 (C.A. 10), certiorari denied, 416 U.S. 941 (testimony admitted). See also *United States* v. *Guana-Sanchez*, 484 F. 2d 590, 592–596 (C.A. 7) (Pell, J., dissenting), certiorari granted, 417 U.S. 967, certiorari dismissed as improvidently granted, 420 U.S. 513.

[11] Application of those considerations to the instant case should result in the admissibility of Hennessy's testimony. With respect to temporal proximity, Hennessy was not contacted for questioning until four months after the search that suggested her as a potential witness and did not testify at trial for another six months. Moreover, when she was first contacted for questioning she expressed a willingness to cooperate derived from her interest in police science, and she later testified that the initial incident concerning the search of the envelope played no role in her readiness to cooperate, since it was not even on her mind. Finally, the initial search of the envelope was hardly flagrant and was in no way motivated by a desire to identify persons who might connect respondent with illicit

A substantially different approach from that of the court below, giving great weight to the inherent differences between the trial testimony of a third party witness and other types of evidentiary fruits, supports the conclusion that it is generally inappropriate to suppress such testimony, except perhaps in egregious cases where a flagrantly unlawful search is undertaken for the conscious purpose of discovering potential witnesses. As Chief Justice (then Judge) Burger observed in *Smith* v. *United States*, 324 F. 2d 879, 881–882 (C.A.D.C.), certiorari denied, 377 U.S. 954:

> The proffer of a living witness is not to be mechanically equated with the proffer of inanimate evidentiary objects illegally seized. The fact that the name of a potential witness is disclosed to police is of no evidentiary significance, per se, since the living witness is an individual human personality whose attributes of will, perception, memory and volition interact to detemine what testimony he will give. The uniqueness of this human process distinguishes the evidentiary character of a

activities. While obviously not commendable, the search consisted of nothing more than casual inspection of an envelope lying on a counter by a policeman who was legally entitled to be where he was. Nor is there any evidence that the search was "purposeful" or its results "exploited"; Officer Biro had no previous knowledge of respondent's gambling activities, and the FBI agent who later interviewed Hennessy had no knowledge that any unlawful conduct had prompted the report that she might be able to supply useful information.

> witness from the relative immutability of inanimate evidence.[12]

Consideration of the basic purposes of the Fourth Amendment, the deterrence objectives of the exclusionary rule, and the impact on the integrity of the judicial process resulting from treating live witness testimony like other evidentiary fruits also supports a general presumption against the suppression of live-witness testimony.

A third approach is reflected in the decisions of the District of Columbia Circuit and other circuits that have applied a variety of factors on a case-by-case basis to determine whether live-witness testimony is sufficiently attenuated to purge the primary taint, but that have also recognized that live-witness testimony is, for these purposes, significantly different from other types of evidentiary fruits.

In short, whether and under what circumstances the exclusionary rule applies to the trial testimony of a

[12] The intervening circumstances of the trial itself and the witness's willingness to testify under oath and to be subject to cross-examination may also warrant a presumption that the testimony is the product of the witness's act of free will rather than of the initial misconduct. As Chief Justice Burger also observed in *Brown* v. *United States*, 375 F. 2d 310, 319 (C.A. D.C.) (concurring), certiorari denied, 388 U.S. 915:

> [L]ive witnesses are not suppressed, as inanimate objects may be. When an eyewitness is willing to give testimony under oath and subject to all the rigors of cross-examination and penalties of perjury, he must be heard. How he came to be in court is a matter which goes only to the weight, not the admissibility of his testimony.

Cf. *Frisbie* v. *Collins*, 342 U.S. 519.

witness whose utility was discovered as a result of an improper search is squarely presented by the decision below, involves a conflict among the circuits, is important to law enforcement, and should be resolved by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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FEBRUARY 1977.

APPENDIX A

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA, APPELLANT,

v.

RALPH CECCOLINI, DEFENDANT-APPELLEE.
No. 1125, DOCKET 76–1091.

ARGUED JUNE 8, 1976.
DECIDED SEPT. 15, 1976.

Before KAUFMAN, Chief Judge, and FEINBERG and VAN GRAAFEILAND, Circuit Judges.

FEINBERG, Circuit Judge:

This admirably argued case comes to us in an unusual procedural posture. After a non-jury trial in the United States District Court for the Southern District of New York on two counts charging perjury before a grand jury, 18 U.S.C. § 1623, Judge Lee P. Gagliardi found defendant Ralph Ceccolini not guilty on one count and guilty on the other. But the judge then immediately set aside the guilty verdict on the ground that essential testimony against defendant had to be suppressed as the fruit of an illegal search. Citing 18

U.S.C. § 3731 and 28 U.S.C. § 1291, the Government appeals and argues that the judge erred in suppressing the evidence and setting aside the verdict. Appellee Ceccolini contends that the Double Jeopardy Clause bars the Government's appeal and, even if that is not so, that the judge's ruling was correct. We reject the former contention, but agree with the latter. Therefore, we affirm.

I.

The relevant facts are as follows. In the second half of 1973, federal authorities conducted an investigation of gambling in North Tarrytown, New York. Surveillance by federal agents included various stores, including defendant Ceccolini's Sleepy Hollow Flower Shop, which were frequently visited by Francis J. Millow, a target of the investigation. In this period, the agents did not question any employee of any of these businesses. Surveillance was discontinued in December 1973.[1]

On December 18, 1974, North Tarrytown Police Officer Ronald Biro entered the flower shop merely, according to Biro, to enjoy a cigarette break. He went into the part of the shop customarily used only by employees, where he noticed on the cash register an envelope with some money sticking out. Biro picked up the

[1] Although surveillance of the stores was discontinued, on December 3, 1974, a telephone conversation between Millow and Ceccolini, implicating the latter in a betting operation, was intercepted by local police officers participating in a combined federal-state gambling investigation.

envelope, examined its contents, saw that it contained currency and policy slips, and replaced it. Lois Hennessy, an employee, was present while this was going on. Biro did not tell Miss Hennessy what he had seen in the envelope but did ask her questions about it. Miss Hennessy told Biro that Ceccolini had told her to give the envelope to someone.

Within 24 hours, Biro notified North Tarrytown detectives who, in turn, informed Lance Emory, an FBI agent who had participated in the gambling investigation. About four months later, Emory interviewed Miss Hennessy at her home for about 20–30 minutes. At the time, Emory was under the impression that Biro's activities had been entirely legal. Miss Hennessy related the events of the December 18, 1974 incident to Emory. Thereafter, defendant Ceccolini was subpoenaed before the grand jury and testified that he had never taken policy bets at his flower shop for Francis J. Millow. The following week, Miss Hennessy gave contradictory testimony before the grand jury; shortly afterwards, Ceccolini was indicted on the perjury charge now the subject of this appeal.[2]

[2] This was Count 1 of the indictment. Count 2 charged that Ceccolini had made a false statement to the grand jury when he testified that he did not know that Hank Bucci was involved in gambling operations. Judge Gagliardi found defendant not guilty on this count because

> although there is evidence to support this charge the government has not met its burden of proof beyond a reasonable doubt. The defense did establish the possibility that Hank Bucci, who had several previous gambling convictions, was not known by the defendant to be currently involved in gambling at the time the question was asked.

Ceccolini made several motions in preparation for trial. In July, the district judge granted various requests for discovery; the Government did not comply until the end of September, shortly before the scheduled trial date. The Government's list of witnesses included Officer Biro, and when the defense interviewed him, it learned for the first time of Biro's December 18, 1974 search. At the start of the trial, defendant orally moved to suppress testimony, including Miss Hennessy's, derived from Biro's search, but acceded to the judge's suggestion that the hearing on the motion proceed simultaneously with the non-jury trial. Thereafter, the judge heard testimony from Officer Biro, Agent Emory and others. At the close of the Government's case, defendant moved for a directed verdict, which was denied. Defendant testified in his own behalf and called other witnesses. The judge, as the trier of fact, reserved decision until after considering a memorandum of law submitted by the Government on the suppression of Miss Hennessy's testimony.

Several months later, the judge in open court pronounced the defendant guilty on Count 1 but then immediately stated his assumption that the defendant's prior motion for a directed verdict included "a motion now . . . to set aside the verdict of guilty on Count 1." Defendant's counsel quickly acquiesced, and the judge then gave an oral opinion in which he first granted the motion to suppress Miss Hennessy's testimony and then set aside the verdict for insufficient evidence. Some colloquy followed in which defense counsel said that the testimony should have been suppressed before the ver-

dict, in which event the Double Jeopardy Clause would have barred government appeal. The judge disagreed and confirmed this view in a later memorandum opinion, which stated, in relevant part:

> In light of the serious legal issues raised by the motion to suppress—particularly on the question of taint—it was this court's explicit intention that the government have the right to appeal an adverse decision on that issue. 18 U.S.C. § 3731 clearly contemplates that the government be permitted to appeal trial court rulings which do not place a defendant in double jeopardy. Here Ceccolini was found guilty on the basis of all the evidence presented to this court. His conviction was set aside because evidence adduced at trial indicated that the testimony of the government's key witness was tainted by an illegal search. The hearing on the motion to suppress was consolidated with the trial for the convenience of the court, counsel and the witnesses, without objection by Ceccolini. Furthermore in this case the issue of taint was sufficiently uncertain that had there been a jury trial, the court would have let the Hennessy testimony go to the jury and then ruled on the motion to exclude it in the event Ceccolini was convicted. Under those circumstances, the government would then have had the right to appeal this court's ruling. There is no reason why the government should be deprived of

this opportunity because the case was tried without a jury.

This appeal by the Government followed.

II.

Ceccolini renews his argument that under the circumstances of this case the Double Jeopardy Clause precludes a government appeal. He claims that the judge should have ruled on the admissibility of Miss Hennessy's testimony before deciding the ultimate issue of guilt or innocence. Had the judge done that, he would have had to acquit because the evidence was otherwise insufficient to convict, as the judge found. Since the Government could not have appealed from such a judgment, it should not be able to do so now.

The argument is correct as far as it goes but it does not go far enough. The judge could have followed the suggested procedure but it was not the only possible alternative. The judge could also have ruled on the motion to suppress prior to the start of the trial. If he had followed that course and reached the same result, the Government points out to us, it could have immediately appealed under 18 U.S.C. § 3731 to test the suppression ruling. We are aware that Ceccolini did not know until just before trial about Biro's search and his connection with the Hennessy testimony and so could not have moved sooner.[3] We also realize that such a motion would have required a separate evidentiary hearing. But in a non-jury case such potential duplica-

[3] Judge Gagliardi so found.

tion of tesitmony is often eliminated at trial, if the motion to suppress is denied, by allowing the record of the suppression hearing to be used at trial. That procedure would have been preferable to the one followed here. See *United States v. Birrell*, 470 F.2d 113, 115 (2d Cir. 1972).

In any event, we agree with the district judge and the Government that the course followed here did not deprive it of the right to appeal. The judge as trier of fact first found defendant guilty and then granted defendant's motion to set aside the guilty verdict. In *United States v. De Garces*, 518 F.2d 1156 (2d Cir. 1975), the same sequence occurred and we held, on the authority of *United States v. Jenkins*, 420 U.S. 358, 365, 368, 95 S.Ct. 1006, 43 L.Ed.2d 250 (1975), that the Government could appeal. The trier of fact in *De Garces* was a jury and here it was a judge, but the distinction is not controlling. If the Government's position on the merits is correct, "a retrial would not be required." *United States v. Jenkins, supra*, 420 U.S. at 365, 95 S.Ct. at 1011, citing *United States v. Wilson*, 420 U.S. 332, 344–45, 352–53, 95 S.Ct. 1013, 43 L.Ed.2d 232 (1975). In *De Garces*, since the Government's position on the merits was correct, we merely vacated the judgment of acquittal granted by the judge after the guilty verdict and remanded the case to the district court with directions to reinstate that verdict. If the Government were correct here on the merits, we would follow the same procedure.[4] This appeal is not offensive to the Double Jeopardy Clause.

[4] Cf. *United States v. Fayer*, 523 F. 2d 661, 664 (2d Cir. 1975).

III.

We turn now to the merits of the Government's appeal. The most damning evidence on Count 1 was the testimony of Lois Hennessy that, while she was an employee at the flower shop, she saw customers place bets with Ceccolini and that she knew these bets were turned over to Millow. Although Miss Hennessy's testimony was corroborated, the judge was correct in holding that without it there was insufficient evidence to convict defendant. The more difficult issue is whether that testimony had to be suppressed as the product of Officer Biro's unlawful search.[5] The Government offers a number of reasons why suppression was inappropriate.

The Government's most substantial argument is that its investigation would have produced Lois Hennessy's testimony even if the December 18, 1974 search had never occurred. It relies upon a line of cases, exemplified by *United States v. Falley*, 489 F.2d 33, 40–41 (2d Cir. 1973), for the proposition that the taint from an unlawful search is removed if independent

[5] The Government conceded at oral argument that Officer Biro's search was illegal, although its brief does note that "there is at least some question" whether Ceccolini can complain of the "Fourth Amendment violation" because he was not present at the time and had transferred "an apparently open envelope to Miss Hennessy," who "would appear to have been authorized to permit perusal of the envelope in the manner that occurred." Brief of the United States of America, at 9*. To the extent the argument is being pressed, we reject it. The point was not raised in the trial court, there is no evidence that Miss Hennessy had authority to show it to anyone but Millow, and Biro apparently searched in the envelope without anyone's permission.

investigation would have led to the evidence in question in any event. See also, e.g., *United States v. Capra*, 501 F.2d 267, 280 n.12 (2d Cir. 1974), *cert. denied*, 420 U.S. 990, 95 S.Ct. 1424, 43 L.Ed.2d 670 (1975); *United States v. Cole*, 463 F.2d 163, 171–74 (2d Cir.), *cert. denied*, 409 U.S. 942, 93 S.Ct. 238, 34 L.Ed.2d 193 (1972). However, Judge Gagliardi was aware of this doctrine, specifically referred to the *Falley* decision twice in his oral ruling setting aside the guilty verdict, and found that:

> [T]he government has failed to show by the fair preponderance of the evidence that Lois Hennessy's knowledge of Ceccolini's gambling operations and her willingness to cooperate with the FBI was the normal output of the investigation which was in progress at the time of the illegal search. Therefore, . . . the *Falley* case . . . cannot be relied on here to purge the Hennessy testimony of the taint resulting from the illegal search on December 18th.

On this ultimate issue, the question is whether Judge Gagliardi's finding was clearly erroneous or embodied an error of law. See *United States v. Schipani*, 414 F.2d 1262, 1266 (2d Cir. 1969), *cert. denied*, 397 U.S. 922, 90 S.Ct. 902, 25 L.Ed.2d 102 (1970).

The Government presses a number of contentions on appeal that are primarily factual. Most of them were argued to the trial judge, who found as follows:

The government contends that since Lois Hennessy was employed in the shop which was already under surveillance the FBI would have inevitably discovered her existence and obtained her testimony for this trial without the illegal search.

I do not agree. Agent Lance Emory, special agent for the FBI in charge of the case, had already stated in response to a question by me that Lois Hennessy came to his attention because of the December 18th incident involving Officer Biro and because she was an employee of the shop. It is thus clear that the illegal search was at least in part the actual source of the government's information that Lois Hennessy would be an important witness about Ceccolini's gambling activities, and that prior to the search the government's attention had not focused on her in that capacity.

While certainly it is possible, perhaps even probable, that the FBI would have interviewed Miss Hennessy later in the course of the gambling investigation, I do not believe that the government has sustained its burden of proving by a fair preponderance of the credible evidence that it would have inevitably come across her in the course of its investigation.

At the time she was interviewed no other employee of Ceccolini's flower shop had been

interviewed by the FBI. While it is true that other employees were subsequently interviewed and called before the grand jury, it is not entirely clear that the investigation would have focused on the employees of the flower shop at all were it not for the illegal search and the favorable response of Lois Hennessy to the FBI interview.

Under these circumstances the government's assertion that any taint resulting from the illegal search is purged by the fact that the Hennessy testimony would have been inevitably discovered by the FBI must fail.

These findings were amply supported by the record.

The Government emphasizes to us that since surveillance of the flower shop and an intercepted telephone call both occurred prior to the illegal search, the latter did not initiate the gambling investigation that led to Ceccolini. However, the direct surveillance of the flower shop had ceased a year before Biro's search and there is no testimony that Agent Emory was aware of the recorded phone call between Ceccolini and Millow when he interviewed Miss Hennessy. Judge Gagliardi obviously felt that the illegal search triggered the phase of the investigation that focused on Ceccolini. His conclusion that the previous investigation did not purge the taint from Miss Hennessy's testimony was a justifiable one.

Citing *Wong Sun v. United States*, 371 U.S. 471, 486, 488, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963), and

United States v. Brignoni-Ponce, 422 U.S. 873, 876 n.2, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975), the Government also claims that the testimony of Lois Hennessy "was an act of free will sufficient to purge the taint of any unlawful invasion that may have occurred on December 18, 1974." [6] The Government stresses that Miss Hennessy's testimony was not coerced, that Agent Emory did not know that Biro's search had been illegal, and that Biro's conduct was hardly purposeful or flagrant. See *Brown v. Illinois*, 422 U.S. 590, 603–04, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975). However, we do not believe that the cited cases and the emphasized facts require us to reverse the trial judge here. Only a few months ago, we analyzed and rejected much the same arguments and affirmed a similar suppression of evidence. *United States v. Karathanos*, 531 F.2d 26, 34–35 (2d Cir.), *cert. denied*, — U.S. ——, 96 S.Ct. 3221, 49 L.Ed.2d —— (1976). See also *United States v. Tane*, 329 F.2d 848 (2d Cir. 1964), discussed at length in *Karathanos*.[7] The Government responds that in *Karathanos* and *Tane*, the witnesses whose testimony was uncovered by the illegal search were pressured into testifying, while Miss Hennessy was not. At oral argument, Ceccolini's counsel disputed the Government's version of what occurred in this case. We need not deal with the issue at length. We doubt that this point was pressed in the district court, because

[6] Brief of the United States of America, at 8.

[7] *Karathanos* takes note of *Brown* v. *Illinois*, 422 U.S. 590, 95 S. Ct. 2254, 45 L.Ed. 2d 416 (1975), *Michigan* v. *Tucker*, 417 U.S. 433, 94 S. Ct. 2357, 41 L.Ed. 2d 182 (1974), and *Wong Sun*, 371 U.S. 471, 83 S. Ct. 407, 9 L.Ed. 2d 441 (1963).

the judge made no specific findings regarding Lois Hennessy's state of mind.[8] But even if the argument had been made, we do not regard it as dispositive under the precedents cited above. *Cf. United States v. Kurzer*, 534 F.2d 511, 518 (2d Cir. 1976). In any event, the road to Miss Hennessy's testimony from Officer Biro's concededly unconstitutional search is both straight and uninterrupted, and we would not hold her testimony admissible merely because her cooperation with the Government was not coerced.[9]

Finally, the Government argues that the rule excluding the fruit of an illegal search is inappropriate in a perjury prosecution, especially when the perjury occurred after the illegal intrusion. Citing *United States v. Raftery*, 534 F.2d 854 (9th Cir. 1976), and *United States v. Turk*, 526 F.2d 654 (5th Cir. 1976), the Government contends that suppression serves no deterrent purpose when the search precedes the crime and that perjury cannot be condoned in any event.

[8] The Government's only reference to this issue in its memorandum of law submitted to Judge Gagliardi concerning the suppression of Miss Hennessy's testimony appears in a footnote in the "Conclusion" of a 14-page memorandum.

[9] The recent decision of a panel of this court in *United States* v. *Mullens*, 536 F. 2d 997 (2d Cir. 1976), is distinguishable. The panel held that statements of a defendant, who presented himself at a police station following an illegal search of his home and the arrest of his parents, were "sufficiently a product of [the defendant's] free will to purge the taint of the earlier, illegal search. . . ." *Id.* at 1000. In *Mullens*, the defendant came forward on his own, and the question was whether his own voluntary statements could be used against him. In this case, the government agent exploited the illegally obtained information by seeking out Lois Hennessy and asking questions directly related to the illegal search.

We put to one side the Government's failure to raise this issue in the trial court, although we view that omission with somewhat more gravity than the Government apparently does. We are fully in sympathy with the Government's plea that perjury not be condoned. But we see no sufficient basis for distinguishing trials of perjury charges from trials on charges of other serious crimes to which the exclusionary rule would apply in the Government's direct case at trial. If the Government's position were accepted, then logically the exclusionary rule would also be nullified for any crime that occurred after the illegal search. Whatever may be the future of the exclusionary rule,[10] we do not understand the Government's position to be the law.[11] Moreover, this is not a case, such as *Raftery* or *Turk*, in which an immunized witness was aware of an illegal search and thereupon made use of that knowledge to perjure himself with impunity. Rather, Ceccolini had no inkling of Biro's actions, and was in fact given comforting assurances by the Government that he was not a target of the grand jury's inquiry. Finally, we disagree with the Government's contention

[10] See, e.g., Kaplan, The Limits of the Exclusionary Rule, 26 Stan. L. Rev. 1027 (1974).

[11] In attacking "the tattered curtain of the exclusionary rule," our dissenting brother relies heavily on *Stone* v. *Powell*, — U.S. —, 96 S. Ct. 3037, 49 L.Ed. 2d —— (1976), and *United States* v. *Janis*, — U.S. —, 96 S. Ct. 3021, 49 L.Ed. 2d —— (1976). But the former opinion reaffirms the exclusionary rule in a direct criminal appeal, — U.S. at —, 96 S. Ct. 3037, which is what we have here. And the latter opinion merely refused to "extend" the exclusionary rule to a civil proceeding brought by or against the United States Government when the evidence was illegally seized by state officers.

that the exclusionary rule serves no purpose here. Thus, we hold that it was proper to suppress Miss Hennessy's testimony in this perjury prosecution.

Judgment affirmed.

VAN GRAAFEILAND, Circuit Judge (dissenting):,

"Such is the irresistible nature of truth", said Thomas Paine, "that all it asks, and all it wants, is the liberty of appearing." [1] Nowhere, I submit, is it more important that truth be given the "liberty of appearing" than in the administration of justice. Accordingly, because my brothers continue to draw the tattered curtain of the exclusionary rule ever tighter in the face of truth, I must once again record my dissent.

The Supreme Court's most recent pronouncement of the exclusionary rule is *Stone v. Powell*, — U.S. ——, 96 S.Ct. 3037, 49 L.Ed.2d ____ (1976). There the Court said at p. ——, 96 S.Ct. at 3049:

> The costs of applying the exclusionary rule even at trial and on direct review are well known: the focus of the trial, and the attention of the participants therein, is diverted from the ultimate question of guilt or innocence that should be the central concern in a criminal proceeding . . . Application of the rule thus deflects the truthfinding process and often frees the guilty. The disparity in particular cases between the error committed

[1] Foner, The Complete Writings of Thomas Paine, 354 (1945).

> by the police officer and the windfall afforded a guilty defendant by application of the rule is contrary to the idea of proportionality that is essential to the concept of justice. Thus, although the rule is thought to deter unlawful police activity in part through the nurturing of respect for Fourth Amendment values, if applied indiscriminately it may well have the opposite effect of generating disrespect for the law and administration of justice.

In the instant case, the defendant, convicted of purjury, is set free because the testimony of a witness, given freely and without coercion, is stricken from the record. How far have we come from the ennobling statement of Benjamin Disraeli that "Justice is truth in action"? How much farther can we go before we generate the "disrespect for the law and administration of justice" which is the concern of the Supreme Court?

Our nation's highest court has firmly committed itself to the proposition that statements voluntarily offered as acts of free will may be received despite a primary taint which might otherwise have made them inadmissible. *Wong Sun v. United States*, 371 U.S. 471, 486, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); *Brown v. Illinois*, 422 U.S. 590, 602, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975).[2] In *Michigan v. Tucker*, 417 U.S.

[2] Although the Government's trial memorandum dealt primarily with the independent source issue, it clearly advanced the possibility that "Miss Hennessy might have inculpated the defendant to the Government of her own volition." The majority correctly points out in a footnote that this argument was set forth in a footnote. However, it must be apparent to the person reading these lines that the contents of footnotes do not escape the attention of careful judges and practitioners.

433, 94 S.Ct. 2357, 41 L.Ed.2d 182 (1974), the Supreme Court held that the "fruit of the poisonous tree" doctrine did not require the exclusion of the testimony of a witness who was identified by the defendant while being interrogated without proper *Miranda* warnings. The Court said at 447–448, 94 S.Ct. at 2365:

> The statements actually made by respondent to the police, as we have observed, were excluded at trial in accordance with *Johnson v. New Jersey*, 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882 (1966). Whatever deterrent effect on future police conduct the exclusion of those statements may have had, we do not believe it would be significantly augmented by excluding the testimony of the witness Henderson as well.

See also United States v. Brignoni-Ponce, 422 U.S. 873, 876 n.2, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975).

Although this Circuit has declined to adopt a rule that the testimony of a living witness is per se admissible despite underlying taint, *United States v. Kurzer*, 534 F.2d 511, 518 (2d Cir. 1976),[3] it has recognized

[3] There is a marked difference on this point between our holdings and those of the District of Columbia Circuit which should, perhaps, be resolved by the Supreme Court. See, *e.g.*, *Brown* v. *United States*, 126 U.S. App. D.C. 134, 375 F. 2d 310 (D.C. Cir. 1966), *cert. denied*, 388 U.S. 915, 87 S. Ct. 2133, 18 L.Ed. 2d 1359 (1967); *Smith* v. *United States*, 117 U.S. App.

that a truly voluntary decision to speak is sufficient to break the causal chain between an illegal search and the statements made. *United States v. Mullens*, 536 F.2d 997 (2d Cir. 1976). This "attenuation-of-the-taint" doctrine is consistent with the balancing of the "public interest in determination of truth at trial" against the "incremental contribution . . . to the protection of Fourth Amendment values by application of the [exclusionary] rule". *Stone v. Powell, supra*, —— U.S. at ——, —— n.26, 96 S.Ct. at 3049 n.26.

Here the witness' "willingness to cooperate with the FBI" [4] was clearly established. The interview with

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D.C. 1, 324 F. 2d 879 (D.C. Cir. 1963), *cert. denied*, 377 U.S. 954, 84 S. Ct. 1632, 12 L.Ed. 2d 498 (1964). In *Smith*, at 881, then Judge Burger said:

> Here no confessions or utterances of the appellants were used against them; tangible evidence obtained from appellants, such as the victim's watch, was suppressed along with the confessions. But a witness is not an inanimate object which like contraband narcotics, a pistol or stolen goods, "speak for themselves." The proffer of a living witness is not to be mechanically equated with the proffer of inanimate evidentiary objects illegally seized. The fact that the name of a potential witness is disclosed to police is of no evidentiary significance, per se, since the living witness is an individual human personality whose attributes of will, perception, memory and volition interact to determine what testimony he will give. The uniqueness of this human process distinguishes the evidentiary character of a witness from the relative immutability of inanimate evidence. (Footnotes omitted).

[4] Assuming that the quoted language from Judge Gagliardi's opinion cannot be construed to be a finding concerning the state of mind of the witness, "the trial resulted in a record

Agent Emory that led to her testimony took place fully four months after the Biro incident, in the calm atmosphere of her home and in the presence of her family. Her narration of the events of December 18 came, not in response to questions referring to that date or to Officer Biro, but rather to a general inquiry as to whether she remembered an incident in December. When asked if she would be willing to help the Government, she replied without hesitation in the affirmative, adding that she was studying police science in college and that she was interested in police work. A careful review of the trial transcript shows her to have been anything but an unwilling witness, a fact highlighted by her statements that she had placed bets with appellant, statements potentially adverse to her penal interests.

The majority appears to concede that this testimony was not coerced and that the witness was not pressured into testifying but finds this not to be dispositive of the issue before us, relying principally on *United States v. Karathanos*, 531 F.2d 26 (2d Cir.), *cert. denied*, —— U.S. ——, 96 S.Ct. 3221, 49 L.Ed.2d —— (1976) and *United States v. Tane*, 329 F.2d 848 (2d Cir. 1964). However, in both *Karathanos* and *Tane* we carefully pointed out that the testimony precluded was coerced and not the product of an act of free will. In my view, the result reached by the majority can only be attributed to its disenchantment with the attenuation rule

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of amply sufficient detail and depth from which the determination may be made." *Brown* v. *Illinois*, 422 U.S. 590, 604, 95 S. Ct. 2254, 2262, 45 L.Ed. 2d 416 (1975).

itself, not the application of the rule to the facts of this case. Like it or not, this rule has repeatedly been approved by the Supreme Court, and its most recent decisions, such as *Stone v. Powell, supra*, show no disposition to retreat from such approval.[5]

In *United States v. Janis*, — U.S. ——, ——, 96 S.Ct. 3021, 49 L.Ed.2d —— (1976), Mr. Justice Blackmun, speaking for the majority said:

> There comes a point at which courts, consistent with their duty to administer the law, cannot continue to create barriers to law enforcement in the pursuit of a supervisory role that is properly the duty of the Executive and Legislative Branches.

When a court prohibits a willing witness from bringing the truth to light solely because she was employed at a place where a school patrol officer impulsively peeked into an open envelope in plain view before him, I think that point has been reached.

I dissent.

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[5] In *Stone*, — U.S. at — n. 26, 96 S. Ct. 3037 n. 6. Mr. Justice Powell, citing *Brown* v. *Illinois, supra*, and *Wong Sun* v. *United States, supra*, stated that the "attenuation-of-the-taint" doctrine is consistent with the balancing approach to the exclusionary rule, the approach advocated by that Court.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the fifteenth day of September one thousand nine hundred and seventy-six.

Present: HON. IRVING R. KAUFMAN
Chief Judge
HON. WILFRED FEINBERG
HON. ELLSWORTH A. VANGRAAFEILAND
Circuit Judges,

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLANT
v. 76–1091
RALPH CECCOLINI,
DEFENDANT-APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

This cause came to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in accordance with the opinion of this court.

A. DANIEL FUSARO,
Clerk
VINCENT A. CARLIN,
Chief Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-first day of December, one thousand nine hundred and seventy-six.

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLANT,
v. 76–1091
RALPH CECCOLINI,
DEFENDANT-APPELLEE.

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed herein by counsel for the Appellant, U. S. A., and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is
Ordered that said petition be and it hereby is denied.

IRVING R. KAUFMAN,
Chief Judge

APPENDIX D

TRANSCRIPT OF RECORD OF PROCEEDINGS
DATED FEBRUARY 10, 1976

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

75 Cr. 519

UNITED STATES OF AMERICA,

v.

RALPH CECCOLINI, *Defendant.*

February 10, 1976
10:20 a.m.

BEFORE:

HON. LEE P. GAGLIARDI,
District Judge.

APPEARANCES:

MICHAEL ABZUG, ESQ.,
Attorney, Special Task Force.

JOEL MARTIN AURNOU, ESQ.,
Attorney for Defendant.

[2] • • •

The Court: Following is the opinion of the Court:

Defendant Ralph Ceccolini was indicted on two counts of perjury allegedly committed on May 12, 1975, in his testimony before a grand jury investigating gambling operations in Westchester County.

The defendant duly waived his right to a jury, and, in addition, did not request the facts be specially found as provided for on Rule 23(c). Nonetheless, since this case presents significant legal questions which could not be reviewed if a general finding were made, the Court feels it appropriate to set forth its findings.

On the basis of all the evidence presented before me at trial, I find the defendant Ceccolini guilty of the crime charged in Count 1, and not guilty of the crime charged in Count 2.

The defendant made a motion for a directed verdict, and I assume that would also include a motion now at this time to set aside the verdict of guilty on Count 1.

Mr. Aurnou: Yes, your Honor.

The Court: The indictment charges the defendant with committing perjury as set forth before in Count 1 in testifying that he never took policy bets [3] at his flower shop in North Tarrytown, New York, for Francis J. Millow, and that he did not know that Hank Bucci, in Count 2, was involved in gambling operations.

As set forth in my finding of guilty on Count 1, I find that contrary to his sworn grand jury testimony that the defendant Ceccolini placed and took policy bets for Millow.

This finding is based upon the testimony of Lois

Hennessy, an employee of Ceccolini's flower shop in 1974, who stated that she observed customers in the shop place policy and football bets with Ceccolini, and that she knew these bets were later turned over to Millow.

She also testified that she herself had placed football and numbers bets during the football season with Ceccolini, and that Ceccolini had discussed various aspects of his numbers operations with her.

Corroboration of her testimony was furnished by a tape recording of a wire tapped conversation between Millow and defendant in which Millow asked Ceccolini for his breakdown "day by day"; by surveillance reports of FBI agents which show that Millow entered the flower shop daily between ten and eleven, remained only a few moments; and that many people regularly entered and left the shop [4] after a few minutes without buying any merchandise; and (3) betting slips seized from Millow's home containing the notation "Chick," allegedly Ceccolini's nickname.

I consider particularly the tape of the telephone conversation between Millow and Ceccolini, which can only be reasonably interpreted to apply to a betting operation, to be significant corroborating evidence of Lois Hennessy's basic testimony.

Although the defense presented witnesses who testified that Lois Hennessy had a reputation for exaggera-

tion, in light of the strong corroborating evidence in this case I find her testimony credible.

In contrast, I find the defendant's testimony that he never collected policy bets for Millow to be unconvincing at best. Despite the many and fine character witnesses vouching for his reputation for truth and veracity, I find that his testimony on cross-examination about the telephone conversation in which he and Millow discuss the need for "day by day totals" related to only two football bets in particular strained the credulity of a reasonable person.

I believe on the basis of Lois Hennessy's testimony the defendant on Count 1 is guilty beyond a reasonable doubt.

[5] * * *

With respect to the charge Ceccolini lied when he denied that he knew Hank Bucci was involved in gambling operations, I find that although there is evidence to support this charge the government has not met its burden of proof beyond a reasonable doubt. The defense did establish the possibility that Hank Bucci, who had several previous gambling convictions, was not known by the defendant to be currently involved in gambling at the time the question was asked.

The difficulty with Count 1 arises from the fact that Lois Hennessy's knowledge about Ceccolini's gambling activities first came directly to the attention of the government as a result of an illegal search. The circumstances surrounding the search described by North Tarrytown Patrolman Ronald Biro at length in his testimony at trial need not be repeated here.

I previously ruled the search to be illegal, and I believe that the government tacitly agreed to this conclusion. The question which I asked counsel to address in post trial memoranda is whether that illegal search taints Lois Hennessy's testimony and requires its exclusion from the trial.

I now find that it does. This finding is based on my finding that the government has not sustained [6] its burden of showing that Lois Hennessy's testimony definitely would have been obtained without the illegal search.

The search in question here took place on December 18, 1974. At that time Ceccolini's flower shop was under surveillance by federal authorities. Patrolman Biro, who made the search, immediately made a report of it to his superiors who subsequently forwarded it to the FBI.

As a result of this search, Lois Hennessy's knowledge of Ceccolini's gambling operations came directly to the attention of the FBI, and she was shortly thereafter interviewed.

The government contends that since Lois Hennessy was employed in the shop which was already under

surveillance the FBI would have inevitably discovered her existence and obtained her testimony for this trial without the illegal search.

I do not agree. Agent Lance Emory, special agent for the FBI in charge of this case, had already stated in response to a question by me that Lois Hennessy came to his attention because of the December 18th incident involving Patrolman Biro and because she was an employee of the shop. It is thus clear that the illegal search [7] was at least in part the actual source of the government's information that Lois Hennessy would be an important witness about Ceccolini's gambling activities, and that prior to the search the government's attention had not focused on her in that capacity.

While certainly it is possible, perhaps even probable, that the FBI would have interviewed Miss Hennessy later in the course of the gambling investigation, I do not believe that the government has sustained its burden of proving by a fair preponderance of the credible evidence that it would have inevitably come across her in the course of its investigation.

At the time she was interviewed no other employee of Ceccolini's flower shop had been interviewed by the FBI. While it is true that other employees were subsequently interviewed and called before the grand jury, it is not entirely clear that the investigation would have focused on the employees of the flower shop

at all were it not for the illegal search and the favorable response of Lois Hennessy to the FBI interview.

Under these circumstances the government's assertion that any taint resulting from the illegal search is purged by the fact that the Hennessy testimony would have been inevitably discovered by the FBI must fail. [8] In order for the inevitable discovery exception to the exclusionary rule, which the government claims this Circuit has adopted in the United States v. Falley, 489 F.2d 33, to be applicable, the tainted evidence discovered must be evidence which absent the illegality would be the normal output of an ongoing lawful investigation.

Here the government has failed to show by the fair preponderance of the evidence that Lois Hennessy's knowledge of Ceccolini's gambling operations and her willingness to cooperate with the FBI was the normal output of the investigation which was in progress at the time of the illegal search. Therefore, even if the Falley case has overruled the Second Circuit's longstanding rejection of the inevitable discovery rule announced in United States v. Paroutian, 299 F.2d 486, it cannot be relied on here to purge the Hennessy testimony of the taint resulting from the illegal search on December 18th.

Since Agent Emory testified that in seeking to interview Lois Hennessy he did in fact rely at least in part on the information forwarded to him by the local au-

thorities which unbeknownst to him resulted from an illegal search, it is clear that her testimony is the fruit of that illegal search and must be suppressed.

This is not a case in which the question is [9] whether the information obtained was from the illegal activity or from some other independent legal source. Here Agent Emory admitted information obtained in the search was relied on in locating a key witness. Without that witness I find that there was insufficient evidence to say beyond a reasonable doubt that Ceccolini was guilty of Count 1 charged in the indictment.

Although the corroborating evidence—particularly the wiretapped conversation—is strong when coupled with Lois Hennessy's testimony, standing by itself it is insufficient to prove Ceccolini's guilt beyond a reasonable doubt.

The foregoing constitutes the Court's findings of fact and conclusions of law.

Now, Mr. Ceccolini was released on his own recognizance.

Mr. Aurnou: He had posted, I believe, an unsecured bond.

The Court: All right. Bail is exonerated.

Mr. Aurnou: Your Honor, may I be heard briefly on a technical matter which has left me in some confusion? Perhaps your Honor would indulge me.

The Court: Yes.

Mr. Aurnou: If I understand correctly, your [10] Honor, in reaching a decision in this case, ruled on both counts prior to the time that you made your finding on the motion. Perhaps I misunderstood that.

The Court: Your motion was denied. The motion for a verdict of not guilty was denied.

Mr. Aurnou: I understand. I was talking about the motion to suppress, sir. In other words, this was an unusual case, as your Honor will recall.

The Court: Yes.

Mr. Aurnou: Only in that my client was not aware of the search until the eve of trial. And when I disclosed that matter to your Honor it was agreed that the question of the illegality of the search would be heard at the same time as the trial itself, and I think your Honor will recall we followed precisely that format.

Now, what I was inquiring into, your Honor, was I did not understand—perhaps I am just in error, and I apologize to the Court if that is so—I do not mean to be, but it was my understanding, your Honor, that the ruling on what essentially is a pretrial motion would precede the findings on Counts 1 and 2, and that the findings on Counts 1 and 2 would be based on that evidence which your Honor would not have suppressed.

[11] • • •

The difference, of course, is one of substance to my

client in terms of double jeopardy. For that reason, your Honor, and only for that reason, and respectfully, I would ask you for a clarification, if I may.

The Court: It is my recollection that during the course of the trial the government counsel conceded that the search was illegal. You weren't there, I know —or were you there?

Mr. Abzug: Yes, I was, your Honor.

The Court: Excuse me.

I thought you had conceded—

Mr. Abzug: We didn't concede it, but your Honor made a finding the search was illegal during the course of the trial.

The Court: I think that has been taken care of, Mr. Aurnou.

Mr. Aurnou: I realize it may be improper, but would you consider seeing Mr. Abzug and myself at the bench for just a moment?

The Court: No, I don't think it is necessary.

Mr. Aurnou: I am concerned only with the clarification of the order in which your Honor wishes these to be recorded, and I mean—it may be just my confusion, your Honor, as I say—if that is so I [12] apologize—but the problem I have is one of substance.

The Court: I would rather not do it right here.

Mr. Aurnou: Very well.

The Court: If you want to submit anything additional on it you are welcome to do it. As you can see, I could have rendered a general verdict.

Mr. Aurnou: I understand that, and that would have in effect had the double jeopardy effect.

The Court: No. I thought this was the appropriate way to see whether or not the determination which I had made as to the inevitable——

Mr. Aurnou: On the inevitable discovery rule, your Honor?

The Court: Yes.

Mr. Aurnou: I certainly take no quarrel with your Honor's ruling. I would only point out to you the reason for my inquiry was that the unusual procedure in this case resulted from the fact that the government did not disclose the existence of the search, and ordinarily that matter would have been covered either at a hearing just prior to the trial, as your Honor customarily would, or even prior to that, and to have the ruling on the merits—

The Court: I excluded what were the results [13] of the search. There is no doubt that I excluded the results of the search.

Mr. Aurnou: I am not very articulate this morning,

but I am suggesting if I understand your Honor correctly——

The Court: I don't think it makes any difference as to when I passed upon the exclusion of the fruits of the search because it was clearly not admissible.

Mr. Aurnou: If that was true, if Lois Hennessy's testimony was a fruit of the illegal search, as I understood your Honor to say, then the decision that your Honor would render on the first count would be precisely the decision that you read toward the end of your opinion with regard to the sufficiency of the evidence. That would provide my client with an acquittal on the merits which would not be appealable, which would be, as a matter of double jeopardy law, final.

The Court: No, I don't think this is any different from my letting it go to the jury in a jury case and then setting it aside afterwards because of the legal grounds I have set forth in here, and that is my purpose in rendering the decision the way I have.

If it had gone to the jury I would have excluded, as I did from my own consideration, the envelope [14] and the contents of the envelope, but I would have permitted Lois Hennessy to have testified and let the jury pass upon it, and if they came in with a verdict of guilty, as I would have done on the facts here, then I would have set it aside on the grounds that I have set forth here.

That is the procedure that I follow.

Mr. Aurnou: I understand exactly what your Honor is saying, and I ask you to clarify for that reason, and I am grateful you have.

My position, just so it is on the record, is if my client were entitled to have the envelope suppressed, and the testimony of Lois Hennessy, and the nature of your reason for setting aside the verdict, then he would have been entitled as a matter of law not to have had the testimony heard.

The Court: I don't see how I could have passed upon the admissibility of Lois Hennessy's testimony until I heard all the testimony at the trial. I certainly could have passed, and did pass, upon the suppression of the fruits of that illegal search by the Tarrytown authorities. If you want to submit anything further to me, you do it.

Mr. Aurnou: I appreciate that, sir.

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1619

UNITED STATES OF AMERICA, APPELLANT

v.

ROBERT J. SCIOS a/k/a ROBERT SCHWARTZ

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

(D.C. Criminal 74-373)

Argued 22 September 1975

Decided 23 August 1976

Before: ROBB and WILKEY, *Circuit Judges* and SOLOMON,* *United States Senior District Judge* for the District of Oregon

Opinion for the Court filed by *Circuit Judge* WILKEY.

WILKEY, *Circuit Judge*: The Government appeals from an order of the District Court (Flannery, J.) of 20 May 1975, suppressing the testimony of a potential witness, Thomas Massa, Jr., at the trial of defendant-appellee Robert J. Scios, indicted for unlawful interception of wire communications, and related offenses.[1] Prior to this order the District Court had issued a memorandum opinion and order on 10 December 1974, suppressing all tangible evidence seized by the FBI and oral statements at the time of arrest of Scios on 15 February 1974.

We do not pass upon the sufficiency of the affidavit supporting the arrest warrant or the validity of the search of Scios incidental to arrest, issues on which determinations favorable to the defendant were relied upon by the trial judge in his first order of December 1974, from which no appeal was taken, and which likewise formed the basis of his later order suppressing testimony, from which this appeal is taken. We do hold that whatever taint attached to the live testimony of the potential witness Massa by reason of the illegal

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• Sitting by designation pursuant to 28 U.S.C. § 294(d).

[1] 18 U.S.C. § 2511(1)(a); disclosure and use of such unlawfully intercepted communications, 18 U.S.C. § 2511(1)(c) and 2511(1)(d); interstate transportation of wire communication interception devices, 18 U.S.C. § 2512(1)(a).

seizure of Scios' file folder was attenuated, and thus the District Court erred in suppressing the potential witness' testimony.

I. BACKGROUND FACTS

On 29 September 1972 electronic devices were found attached to the telephone lines of a local business. After a lengthy FBI investigation, the search for the offender narrowed to the defendant Scios, and on 15 February 1974 a warrant for his arrest was obtained in the District of Columbia. Scios was arrested in his office in New York City that day. In a search purportedly incidental to arrest, an FBI agent pulled out a file folder labeled "Your Pharmacy, Inc." from a wire rack on top of a credenza three or four feet from the chair in which Scios was sitting. Among other things in the folder was a credit card charge slip from the Royal Motel in Washington, D. C., which had defendant Scios' name and the date 26 July 1972 on it. This date was embraced in the period one and a half years earlier from 19 July to 10 August 1972 during which the wiretapping offenses were alleged in the indictment to have occurred. On the itemized bill of the motel itself was written at the top only "Mr. Massa", with no address, presumably indicating who had occupied the room.

In its customary way the FBI began a follow up on all leads to be derived from the file folder. On interview the desk manager at the Royal Motel did not recall the occupant of the room on the date shown on the receipt.

Nor did the bookkeeper at the motel recall the occupant either, but inquiry revealed that there was still available the record of telephone calls made from the room. This consisted of four numbers, two local, one in New Jersey, and one in New York. Subscribers to all phones were identified, the one in New York being Thomas Massa. A grand jury subpoena for Thomas Massa was issued. The U. S. Marshal serving the subpoena discovered there were two Thomas Massas, Senior and Junior, father and son. Contact was made with Thomas Massa, Sr., and other members of the family, but Thomas Massa, Jr. was out of town, unlocatable and unavailable for several days.

After telephone calls to members of the family and to the potential witness himself, on 5 May 1974 Thomas Massa, Jr. travelled to Washington and conferred with an Assistant U. S. Attorney. The witness' position was that he would assert his privilege against self-incrimination, the prosecutor countered that a grant of immunity was in process, and asked for an off-the-record proffer, with which Massa complied by giving an outline of his prospective testimony. After going before the grand jury and asserting his privilege that day, Massa testified before the grand jury on 8 May under a grant of immunity.

In its 10 December 1974 order the trial court ruled that the affidavit was insufficient to support the arrest warrant, because there was not probable cause to believe that defendant Scios had committed the wiretapping crimes. Alternatively, the court ruled that if the affidavit in support of the arrest warrant was suffi-

cient, the search was illegal on two grounds: (1) The file folder was not in plain view; (2) It was seized from an area that was not in defendant's control at the time of arrest, and thus was not subject to search incident to arrest for the purpose of protecting the arresting officers. From this first order suppressing "tangible evidence" derived from the file folder and "oral statements" the Government did not take an appeal. In a further hearing on 7 May 1975 to clarify whether Massa would be allowed to testify, the District Court ruled that the taint from the unlawful seizure of the file folder had not been dissipated, and therefore that the witness Massa could not testify at the trial of defendant Scios.

II. THE "ATTENUATION-OF-THE-TAINT" DOCTRINE AS AN EXCEPTION TO THE EXCLUSIONARY RULE.

A.

One matter related and preliminary to our discussion of the attenuation-of-the-taint doctrine should be disposed of first. Defendant-appellee Scios contends that the court lacks jurisdiction over this appeal under 18 U.S.C. § 3731 because (1) the District Court order of 10 December 1974 covered the testimony of all live witnesses as well as tangible evidence discovered as a result of the search and seizure held to be illegal, and (2) the Government did not appeal from this first order. The Government's position is that it is appealing from the District Court order of 20 May 1975, wherein the court ruled directly on the admissibility of the witness Massa's testimony.

However, in that second order, the District Judge did say "In an opinion and order issued December 10, 1974, this court ruled that the arrest and search of defendant Scios had been illegal and granted in full the motion to suppress evidence derived from the illegal search and seizure. The Government did not appeal." Scios contends that the District Court's second order interpreted its own first order to mean that the first order also had ruled on the inadmissibility of live testimony, such as that of Massa derived from the file folder illegally seized. If that was the District Judge's intention, he did not specifically say so, and the defendant's motion did not refer to future live testimony but only to "tangible evidence" and "oral statements." We interpret "oral statements" as being like "tangible evidence," already obtained and admissible on their own, such as anything Scios may have said at the time of arrest, not the live testimony of a witness to be offered in the future. Furthermore, as will be seen from our discussion of the attenuation-of-the-taint doctrine, the District Court was in no position in December 1974 to rule on the admissibility of any witness' live testimony, because the admissibility of any evidence, which arguably was admissible under the attenuation doctrine, would necessarily rest on the individual facts of attenuation, acts of volition, etc., in regard to that particular witness.

Anticipating that the issue of live testimony might arise later, the Government had requested, in the event of a ruling unfavorable to the Government, in its supplemental pleading of 22 November 1974, a hearing

on the question of "inevitable discovery". By this we understand that the Government assumed that the issue of live witnesses' testimony would arise if the court ruled against the Government on defendant Scios' motion to suppress on the grounds of illegal search and seizure. Prior to the trial court's first opinion and order ruling on the defendant's motion to suppress, the trial court was not even aware of the content of Massa's probable testimony, nor of all of the circumstances with regard to Massa intervening between the discovery of his bare name on the motel bill and his testimony before the grand jury. It is impossible to say that the trial judge in December 1974 knew facts which were only brought out in the hearing of 7 May 1975. Hence, the trial judge not being familiar with the facts surrounding Massa's prospective testimony, which would support the Government's attenuation-of-the-taint argument, he could not have intelligently ruled either to admit or suppress it.

We thus accept the Government's position that it did not appeal the December 1974 order because this was limited to suppressing tangible evidence and oral statements already garnered, but that it did seek and obtain a hearing on live testimony of witnesses derived from the file folder, and it now appeals from the trial judge's second order suppressing the live testimony of the prospective witness Massa.

B.

If there were no exception to the "fruit of the poisonous tree" rationale, then the establishment (1) of an

illegal search and seizure, plus (2) that a piece of evidence, whether tangible or live witness testimony, was somehow derived through a chain of causation from the illegal search, would in every case be sufficient to bar the evidence. Yet the Supreme Court has consistently refused to adopt a "but for" test whereby all evidence which would not have been discovered but for the illegal search must be excluded. If the two points above were sufficient in every case to bar admissibility, there could be no attenuation-of-the-taint doctrine exception to the fruit of the poisonous tree rationale. "Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' Maguire, Evidence of Guilt, 221 (1959)" [2] Primary taint may be purged, for example, where circumstances which disrupt the causal link [3] or make it too remote [4] have intervened between the discovery of the identity of a possible witness and the actual testimony of that witness.

As we read the decisions of the Supreme Court on

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[2] *Wong Sun* v. *United States*, 371 U.S. 471, 488 (1963).

[3] An independent act of volition may dissipate the taint. *Id.* at 491.

[4] See *Nardone* v. *United States*, 308 U.S. 338, 341 (1939). U.S. District Judge Gesell has restated *Nardone*, quoted at *infra* 22, as holding that where "the causal connection between initial illegality and evidence is such that 'good sense' indicates it is so complicated, remote and indirect . . . no deterrence could be achieved by exclusion." *United States* v. *Alston*, 311 F. Supp. 296, 299 (D.D.C. 1970).

this point, the rationale of the attenuation-of-the-taint doctrine is that the principal purpose of the exclusionary rule ("to safeguard Fourth Amendment rights generally through its deterrent effect")[5] would not be served by the exclusion of any given evidence (whether tangible or from a live witness) because the possible effect of deterrence on law enforcement officers' conduct would be too remote, just as remote as the attenuated lengthy link-up of illegal search with the ultimate evidence offered. Because of the remoteness and attenuation of the linkage, both between the search and the evidence offered, and between the exclusion penalty and the possible deterrence of future police misconduct, it would not serve the purpose of justice to deny truth in a particular trial. The sacrifice of foregoing admittedly valid evidence is a pure sacrifice, without any advantage to the administration of justice whatsoever, if there is to be no deterrent effect on future violations. The true interest of justice requires that we accept the truth as testified to by the witness or the tangible piece of evidence, even though the origin of the evidence admittedly in the tenuously linked past was an illegal search and seizure.[6]

A series of Supreme Court decisions in recent years

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[5] *United States* v. *Calandra*, 414 U.S. 338, 348 (1974).

[6] This is not the same as finding an "independent source" for the evidence offered by the Government. The attenuation doctrine recognizes that the proffered evidence did indirectly derive from an illegal search and seizure, but also recognizes that the linkage is too remote for the exclusionary rule to have any success in achieving its avowed purpose of deterrence or promoting judicial integrity.

has emphasized that the exclusionary rule is not to operate rigidly and automatically. As early as *Wong Sun* v. *United States*[7] the Court noted: "We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light *but for* the illegal actions of the police."[8] Again, in *United States* v. *Calandra*,[9] Mr. Justice Powell wrote: "Despite its broad deterrent purpose, the exclusionary rule has never been interpreted to proscribe the use of illegally-seized evidence in all proceedings or against all persons."[10]

Even more recently, in *Brown* v. *Illinois*,[11] the Court confronted the attenuation exception to the exclusionary rule in a situation similar to that in *Wong Sun*, *supra*. While the Supreme Court held that the Illinois court erred in adopting a *per se* rule that *Miranda* warnings in and of themselves broke the causal chain so that any subsequent statement was admissable, the Court held that "in order for the causal chain, between the illegal arrest and the statements made subsequent thereto, to be broken, *Wong Sun* requires . . . that it [subsequent statement] be 'sufficiently an act of free will to purge the primary taint.' "[12] Mr. Justice Blackmun further explained: "While we therefore reject the

[7] 371 U.S. 471 (1963).

[8] *Id.* at 487 (Emphasis supplied).

[9] 414 U.S. 338 (1974).

[10] *Id.* at 348.

[11] 422 U.S. 590 (1975).

[12] *Id.* at 602.

per se rule which the Illinois courts appear to have accepted, we also decline to adopt any alternative *per se* or 'but for' rule."[13] The Court went on to say that whether a confession is the product of a free will under *Wong Sun* must be answered on the facts in each case, and that while the *Miranda* warnings are an important factor, they are not the only factor to be considered as to whether the confession was obtained by exploitation of an illegal arrest.

The Case of Scios here does not deal with his or Massa's confession, the question of attenuation arises in regard to the testimony of the witness Massa ultimately derived from the illegal search. We cannot, therefore, have a *Miranda* warning as a possible intervening factor producing "an act of free will to purge the primary taint". However, after Mr. Justice Blackman [sic] in *Brown* v. *Illinois* had pointed out the usual inconclusiveness of the *Miranda* warning *per se*, he enumerated other factors to be considered: "The temporal proximity of the arrest and the confession, the presence of intervening circumstances, see *Johnson* v. *Louisiana*, 406 U.S. 356, 365 (1972), and, particularly, the purpose and flagrancy of the official misconduct are all relevant."[14] These factors cited by the Court in *Brown* are relevant to the Scios-Massa situation here, as we discuss under part C, *infra*.

Anticipating his opinion for the Court a year later in *Stone* v. *Powell*,[15] in his concurring opinion in *Brown*

[13] *Id.* at 603.

[14] *Id.* at 603–04, (footnotes omitted).

[15] 44 U.S.L.W. 5313 (6 July 1976).

Mr. Justice Powell observed, "[t]he notion of the 'dissipation of the taint' attempts to mark the point at which the detrimental consequences of illegal police action become so attenuated that the deterrent effect of the exclusionary rule no longer justifies its cost." [16] And in words even more specifically applicable to the case of Scios here, he continued: "If an illegal arrest merely provides the occasion of initial contact between the police and the accused [witness here], and because of time and other intervening factors the accused's eventual statement is the product of his own reflection and free will, application of the exclusionary rule can serve little purpose: the police normally will not make an illegal arrest in the hope of eventually obtaining such a truly volunteered statement." [17]

A year later, in the most recent Supreme Court decision bearing on these issues, *Stone* v. *Powell*,[18] in the opinion for the Court Mr. Justice Powell referred to ". . . the balancing analysis applied generally in the exclusionary rule context",[19] and noted specifically "[t]he 'attenuation-of-the-taint' doctrine also is consistent with the balancing approach," citing *Brown* v. *Illinois*, *supra*, and *Wong Sun*, *supra*. *Stone* held that a state prisoner need not be granted habeas corpus relief on the ground that evidence obtained through an unconstitutional search and seizure was introduced at his trial as long as the state has afforded an opportun-

[16] 422 U.S. at 609.

[17] *Id.* at 610.

[18] Note 15, *supra*.

[19] 44 U.S.L.W. 5320, note 26.

ity for a full and fair litigation of that claim. In *Stone*, the Court voiced the most valid and irrefutable criticism of the exclusionary rule: "Application of the rule thus deflects the truth-finding process and often frees the guilty. The disparity in particular cases between the error committed by the police officer and the windfall afforded a guilty defendant by application of the rule is contrary to the idea of proportionality that is essential to the concept of justice." [20] In deciding the specific issue of *Stone*, the Court held that "[t]he answer is to be found by weighing the utility of the exclusionary rule against the cost of extending it to collateral review of Fourth Amendment claims." [21]

C.

We think the balancing approach taken by the Supreme Court in these most recent exclusionary rule cases requires an application of the attenuation-of-the-taint doctrine in the circumstances of this illegal search and seizure followed by the ultimate discovery and proffer of the testimony of the witness Massa. In that balancing we put into the scales the relevant factors listed by the Court in *Brown*.[22]

These factors were listed by Justice Blackmun for their bearing on whether the evidence in question, here the testimony of Massa, was obtained "by exploitation" of the illegal action, here the seizure of the file

[20] *Id.* at 5320.

[21] *Id.*

[22] Text at note 14, *supra*.

folder. We have earlier noted[23] that the taint of an illegal seizure can be purged, and "exploitation" thereby avoided, if the evidence in question is obtained only after intervening circumstances, such as an act of volition by the witness. One of the key elements in determining volition is, of course, temporal proximity,[24] since, like access to counsel, this factor may be a precondition to meaningful reflection and decision. In articulating the "possible relationships" of these factors, Justice Powell, concurring,[25] suggested that the less offensive the violation of the Fourth Amendment, the less proof of volition ought to be required.[26]

[23] *Supra* at 7.

[24] See *Brown* v. *United States*, 375 F. 2d 310, 314 (D.C. Cir. 1967): "In the circumstances of the case this intervening period, with the impact upon [the challenged witness] of innumerable incidents and his mental processes of thirteen months, attenuate any taint which may have existed originally." (citation omitted).

[25] *Brown* v. *Illinois*, *supra* at 610–12.

[26] "[T]he point at which the taint can be said to have dissipated should be related, in the absence of other controlling circumstances, to the nature of the taint." . . . "Those most readily identifiable are on the extremes: the flagrantly abusive violation of Fourth Amendment rights, on the one hand, and 'technical' Fourth Amendment violations, on the other. In my view, these extremes call for significantly different judicial responses.

"I would require the clearest indication of attenuation in cases in which official conduct was flagrantly abusive of Fourth Amendment rights." . . . "At the opposite end of the spectrum lie 'technical' violations of Fourth Amendment rights where, for example, officers in good faith arrest an individual in reliance on a warrant later invalidated or pursuant to a statute that subsequently is declared unconstitutional," *Id.* at 609–11. (footnotes and paragraphing omitted.)

Where a violation of the Fourth Amendment approaches a good error, the deterrence value of exclusion of the fruits of the search, he argues, loses much of its force[27] and should be applied flexibly. We adopt this suggestion of a variable standard of proof, not repudiated by the *Brown* majority, and consider it fully consistent with the balancing calculus demonstrated by *Calandra* and *Stone*. As we will detail later,[28] the seizure of the file folder here constituted, at most, "a marginal case of law enforcement misconduct" and warrants, therefore, a less stringent showing of volition.

Turning to the first factor, temporal proximity, from the contacts with his family by the Government investigators the witness Massa learned in March or April 1974 of the Government's interest in his testimony. He journeyed to Washington and had an interview with the prosecutor on 5 May. Before his Washington trip he had conferred with a lawyer in New York and conferred with different counsel in Washington after his interview. It was on 8 May 1974 that the District Court signed immunity papers and Massa testified before the grand jury under a grant of immunity. He has yet to testify in court, and it is this testimony which is to be offered as evidence here. By comparison, in the case of Wong Sun, the Court held that in light of his release on his own recognizance and of his return voluntarily several days later to make the disputed statement, the connection between

[27] See also *Michigan* v. *Tucker*, 417 U.S. 433, 447 (1974).

[28] *Infra* at 19–20.

his unlawful arrest and the statement had "become so attenuated as to dissipate the taint." [29] It was that statement, or confession, already made, which the prosecution wished to produce in Wong Sun's case.

We do not think any given number of days or hours can be defined as a requisite temporal interval between arrest and confession as in *Wong Sun* and *Brown*, nor between contact with the prosecutor and informal statement, grand jury testimony, or testimony at trial as here is offered, whichever is taken as the proper measuring terminal for "temporal proximity".[30] Rather we think that what is important is an interval of time

[29] *Nardone* v. *United States*, 308 U.S. 338, 341 (1939).

[30] Where there is an illegal arrest and a subsequent confession, it is clear that the time interval to be measured is that between arrest and giving the confession, as *Wong Sun* and *Brown* both hold. Where there is an arrest accompanied by an illegal search producing evidence which much later leads to a live witness, a question arises as to the relevant time interval, i.e., from search to first statement of the witness (5 May 1974 here), to grand jury testimony (8 May), or to testimony at trial (not yet held). The confession in *Wong Sun* and *Brown* was the evidence to be offered at trial; neither the "off-the-record" statement of the witness Massa to the prosecutor nor his grand jury testimony would be available at trial except by way of impeachment, the evidence ultimately derived here from the search and the evidence which has been ordered suppressed is the prospective live testimony of the witness at a trial not yet held. Which is the terminus of the time interval by which to measure "temporal proximity"?

If it is the first statement of the witness, the intervening factors are the FBI investigation, series of contacts with the Government, and advice of New York counsel. Arguably the court's action in granting immunity would not be an intervening factor, although it is undisputed that Massa made no

during which the originator of the statement or testimony can ponder the consequences of what he does and then willingly do it. In the case at bar, Massa was informed by his family while he was in New York of the desire of the Government investigators to talk with him before there ever was any contact with him personally. As to what was desired of him, he had time to ponder the two or more telephone calls made by the prosecutor to him and his family in New York, time in which to consult a lawyer prior to his trip to Washington, and whatever time he thought he needed on the basis of his previous reflection to consider what he should tell the prosecutor and what should be his testimony after he met with the prosecutor. The first information which Massa gave the Government was an outline of what his testimony would be, but this was only after he himself had defined his position as planning to assert his privilege against self-incrimination

statement at all on 5 May 1974 until the prosecutor told him that court process to secure immunity had already been set in motion. If the grand jury testimony on 8 May is the terminus of the time interval, we have the additional intervening factors of judicial action and consultation with Washington counsel. If the testimony in court, the evidence which was actually ordered suppressed, be taken as the terminus, the witness has had an additional two and a half years for reflection, other factors to intervene, and exercise of his volition.

We do not find it necessary to decide (doubtless the Supreme Court will ultimately enlighten us), for here we find the "temporal proximity" to the earliest terminus, the first informal statement, to be so elongated as to afford sufficient opportunity for the witness' independent reflection. Finally, "temporal proximity" is but one of the three factors listed in *Brown* bearing upon the existence of an act of volition on the part of the witness.

in the grand jury and had been informed that the court would grant him immunity in order that he could testify. On that same day, since immunity had not been granted, Massa did claim his Fifth Amendment privilege before the grand jury. Three days later, after the District Court signed immunity papers, Massa did testify before the grand jury. It is the witness' live testimony in court which the prosecution now wishes to offer, which has been suppressed, and which the witness has had two and a half years to ponder, assisted by legal advice.

We think the totality of these circumstances shows a reflective man seeking advice, pondering in advance the consequences of action, exercising his free will in giving the prosecutor certain information verbally, but on the very same day declining to testify before the Grand Jury, and then later after further counsel and immunity had been secured, testifying before the Grand Jury. These are acts of volition. The testimony at trial will be "the product of a free will." [31]

To the extent that Massa's testimony may be considered not the product of his free will, but rather the product of the court's grant of immunity and order that he appear and testify, this brings us to the second of the relevant factors listed in *Brown*, the presence of intervening circumstances. With regard to the court's action as constituting intervening circumstances, we note the similarity of Massa's situation with that in *Johnson v. Louisiana*,[32] the very case cited

[31] *Brown* v. *Illinois*, 422 U.S. at 603.

[32] 406 U.S. 356 (1972).

by the Court in *Brown* as relevant to this particular factor. In *Johnson*, the appellant was arrested at his home without a warrant, booked and then submitted to a line-up. The Supreme Court, however, rejected his claim that the identification from the line-up should be excluded as the fruit of an illegal entry and arrest.[33]

In *Johnson*, Mr. Justice White pointed out that prior to the lineup Johnson was brought before a committing magistrate to advise him of his rights and to set bail. Consequently, at the time of the lineup, the detention of Johnson was under the authority of this commitment, and the lineup was conducted not by exploitation of the challanged arrest but "by means sufficiently distinguishable to be purged of the primary taint".[34] Thus, here, when Massa testified before the grand jury under a grant of immunity, he was testifying under the authority of the immunity papers signed that same day by the district judge. The grand jury testimony thus was not an exploitation of the challenged arrest but the product of the act of the district judge in granting immunity "sufficiently distinguishable to be purged of the primary taint."

It should be noted that this *Johnson* ground for at-

[33] The Court did not review the issue of the arrest itself, which had been held legal by the court below, 255 La. 314, 230 So. 2d 825 (1970), because in any event it found that the identification could not "properly be characterized as the fruit of an illegal entry and arrest." *Johnson*, *supra* at 356.

[34] *Id.* at 365, quoting *Wong Sun* v. *United States*, 371 U.S. 471, 488 (1963). Cf. *Walker* v. *City of Birmingham*, 388 U.S. 307 (1967), where action in violation of a court order was not excused even though the statute underlying the court order may well have been unconstiutional.

tenuation appears to be a separate and distinct basis from the volition ground. The intervening circumstance of the court custody did not presumably affect Johnson's volition: He probably would have refused the line-up if given the option. This *Johnson* ground seems also to be separate from the theory, developed above, about the remoteness of the causation: the court custody followed directly upon the warrantless arrest.

The facts of Scios' case show many other circumstances intervening between the discovery of the bare inscription "Mr. Massa" on the motel charge slip in the illegally seized file folder and the informal statement to the prosecutor or the ultimate testimony of Massa before the grand jury or at the coming trial. On 15 February 1974 the name "Mr. Massa" on the motel receipt in itself conveyed absolutely nothing. It was the subsequent FBI investigation over a period of weeks, patiently following each link in the chain, which eventually brought Thomas Massa, Jr. to Washington to the U.S. courthouse on 5 and 8 May 1974. All that the FBI knew at the time of seizure was that presumably the motel bill paid by Scios had something to do with Your Pharmacy, Inc., since it was in the file folder so labeled. It was necessary for the FBI to contact the hotel manager, who had no information, then to contact the hotel bookkeeper, who likewise had no recollection of Massa. Following its usual investigative technique, the FBI did persuade the bookkeeper to locate telephone records associated with this room number on the date in question. Out of the four numbers dialed from that room a New York FBI agent

found the name of Thomas Massa as a subscriber to the New York number. On service of the subpoena by a deputy marshal it was learned that there were two Thomas Massas. The most likely prospect, Thomas Massa, Jr., was unavailable and no information was obtainable then as to his whereabouts. After the Government investigators subpoened Massa's father, spoke with his mother, and ultimately with Massa himself, Massa eventually came to Washington.

True that the illegal seizure on 15 February provided a lead (doubtless one among dozens), but many investigative steps were necessary before "Mr. Massa" was even identified, before he was located, before he was persuated to come to Washington, and only after the machinery to grant immunity had been set in motion was the prosecution able to discover whether Messa in fact had any relevant testimony to give.

We therefore conclude that all these intervening factors serve to make the causal connection so complicated and remote as to dissipate the taint. Contemplating this situation, one commentator wrote:[35]

> In such a case it is highly unlikely that the police officers foresaw the challenged evidence as a probable product of their illegality; thus it could not have been the motivating force behind it. It follows that the threat of exclu-

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[35] Note, *Fruit of the Poisonous Tree—A Plea for Relevant Criteria*, 115 U. Pa. L. Rev. 1136, 1148–49 (1967).

sion could not possibly operate as a deterrent in that situation.

As further demonstration that the deterrent purpose of exclusion would be minimally advanced in this case, we now turn to the third factor enumerated in *Brown* v. *Illinois*, "particularly, the purpose and flagrancy of the official misconduct". In so doing, we remember to focus on "the deterrent purpose served by the exclusionary rule, consistently with the balancing analysis applied generally in the exclusionary rule context." [36] We think it virtually impossible to argue that suppression of the testimony of the witness Massa will deter similar investigative agency conduct in the future. Application of the exclusionary rule could work only harm here. The conduct of the FBI agents in making the arrest of Scios and in further investigation is hardly to be censored. At Scios' home, the agencts entered only after he had given his valid consent. Furthermore, as the trial court put it, "Scios himself chose to lead the agents to his office and the agents had no information that Scios even had an office." [37] The arresting agents found a business file folder labeled with the name of the business entity whose wiretapping they were investigating, "Your Pharmacy, Inc.", in a wire rack on a credenza three to four feet from the desk where Scios was seated when he was arrested. It was argued, and so held by the trial judge, that at the moment the agent spotted the file folder

[36] *Stone v. Powell, supra* at 5320, n. 26.

[37] Memo. Op. of 10 Dec. 1974. App. at 51 n. 8. (This opinion is unreported).

Scios had already been disarmed and an agent had placed himself between Scios and the credenza and thus was in a position to prevent any lunge for a weapon in that direction. But surely investigative agents are supposed to look around the close vicinity of the accused at the time of making an arrest. Accepting the findings of the trial judge on conflicting evidence, the file folder with a visible label "Your Pharmacy, Inc.", named in the affidavit supporting the arrest warrant, was discovered by the agent in fingering a stack of folders so that their labels could be read. If this folder had been the first in line, it would have been in "plain view" and subject to seizure.[38]

Surely this is a marginal case of law enforcement misconduct, even if it can be labeled as such. It would be difficult to hold in retrospect that the FBI agent in charge of this arrest should then and there have made the judicial decision that the file folder and its contents were out of bounds, and that the agents would open the folder at the peril of having any evidence discovered by later lengthy investigation of leads barred from admission at trial. Such a holding would not be rational, first, because it is likely to have absolutely no deterrent effect on investigative agent conduct in the future, and secondly, if it did, it would probably deter agents from acting to secure investigative leads when

[38] The "plain view" doctrine seems to be an "eyes only" matter. Here the agent used his fingers to riffle a stack of folders, and thus, according to the trial judge, sinned irremediably. What if the agent had craned his neck, or bent his knees to read the label? We do not pass on the legality of the search here.

they should act in marginal cases, all to the detriment of the interest the law abiding public has in effective law enforcement.

In considering whether exclusion would serve a "valid and useful purpose," [39] we are further guided by the increasing case law that also pivots exclusion upon the nature of police misconduct. In *Michigan* v. *Tucker*,[40] for example, police learned the name of a witness from a statement obtained without full *Miranda* warnings, although in good faith compliance with pre-*Miranda* standards.[41] Noting that the statement obtained under interrogation was excluded at trial, the Court concluded that, "[w]hatever deterrent effect on future police conduct the exclusion of those statements may have had, we do not believe it would be significantly augmented by excluding the testimony of the witness . . . as well." [42] And so in the case at bar: evidence taken from the search is excluded though the search itself has been conducted in a good faith manner,[43] whatever additional deterrent value would be gained by exclusion of the fruits, particularly

[39] *Michigan* v. *Tucker*, *supra* at 446.

[40] *Id.* at 435–37.

[41] The interrogation took place before the decision in *Miranda*, 384 U.S. 436 (1966), but the trial occurred afterwards, thus making *Miranda* applicable under the holding of *Johnson* v. *New Jersey*, 384 U.S. 719 (1966).

[42] *Michigan* v. *Tucker*, *supra* at 448.

[43] On the facts of this case, it would appear that the officers would be entitled to a good faith immunity from suit. *Pierson* v. *Ray*, 386 U.S. 547 (1967). See also *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971).

here with the long chain of causation, is not justified by the loss of this opportunity for testimony.

For reasoning parallel to *Tucker*, the nature of police misconduct has been critical in the admission of illegally seized evidence in probation and sentencing proceedings.[44] Decisions not to apply standards under the Fourth Amendment retroactively have also relied upon good faith conduct.[45] One further example will suffice. In recently allowing illegally seized evidence to be admitted in civil proceedings, the Court in *United States* v. *Janis*,[46] in stating the proposition to be resolved, included that the officers acted "in good faith reliance on a warrant that later proved to be defective." For reasons of logic and precedent, therefore, we conclude that the application of the "fruits" doctrine here would not aptly serve its deterrent rationale.

In the words of Mr. Justice Frankfurter: "Sophisticated argument may prove a causal connection between information obtained through illicit wire-tapping [illegal search]and the Government's proof. As a matter of good sense, however, such connection may

[44] Compare *United States* v. *Vandemark*, 522 F.2d 1019 (9th Cir. 1975) with *Verdugo* v. *United States*, 402 F. 2d 599 (9th Cir. 1968), *cert. denied*, 402 U.S. 961 (1971).

[45] *United States* v. *Peltier*, 422 U.S. 531 (1975). The Court explained that, "[i]f the purpose of the exclusionary rule is to deter unlawful police conduct, then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment." *Id.* at 542.

[46] 44 L.W. 5303 (6 July 1976).

have become so attenuated so as to dissipate the taint." [47] This is such a case.[48] The witness Thomas Massa, Jr., may testify. The order appealed from is set aside and the case is

Remanded.

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[47] *Nardone* v. *United States*, 308 U.S. 338, 341 (1939).

[48] We note that District Judge Flannery did not have the benefit of the Supreme Court opinions in *Brown* v. *Illinois*, 422 U.S. 590 (June 1975) or *Stone* v. *Powell*, 44 L.W. 5313 (6 July 1976), *United States* v. *Janis*, 44 L.W. 5303 (6 July 1976), and other Supreme Court decisions on the exclusionary rule during the 1975–1976 term, when he ruled on 20 May 1975 barring the testimony of the witness.

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